

Decision 01-05-041 May 14, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of 360networks (USA) Inc. Under Section 853 of the Public Utilities Code for Modification of the Procedures by which Non-Dominant Interexchange Carriers and Competitive Local Exchange Carriers Seek and Obtain Commission Authority Under Section 851 of the Public Utilities Code to Transfer Assets or Interests in Telecommunications Facilities.

Application 00-11-055
(Filed November 20, 2000)

O P I N I O N

A. Summary

This decision denies the request of 360networks (USA) Inc. (“360networks” or “Applicant”) for exemption from Pub. Util. Code § 851¹ for transfers of assets and interests between non-dominant interexchange carriers (NDIECs) and competitive local exchange carriers (CLCs).

B. Background

360networks is a telecommunications carrier certificated as an NDIEC subject to the jurisdiction of the Commission. 360networks has an application pending for authority to operate as a CLC providing local telecommunications services.² On November 20, 2000, 360networks filed this application requesting

¹ All statutory references are to the Public Utilities Code unless otherwise noted.

² See Application (A.) 00-10-005.

that the Commission exercise its authority under § 853 to exempt transfers of assets and interests between NDIECs and CLCs from review under § 851.³

The application was noticed in the Commission's Daily Calendar and there were no responses or protests to the application.

Currently, the Commission requires certified NDIECs and CLCs who seek a transfer of control or assets to file an advice letter with the Commission for approval of the transaction. The Commission established this advice letter procedure in Decision (D.) 94-05-051 as a way to expedite the review and approval process by which NDIECs obtain authority for non-controversial transactions subject to §§ 851 through 854. In D.98-07-094, the Commission extended the procedure to apply to CLCs seeking authority, pursuant to §§ 851 through 854, for non-controversial transfers of control or assets.⁴ NDIECs and CLCs may only use the advice letter process if the entity acquiring the assets or control is another Commission certified entity or the parent of a certified entity. The advice letter is automatically approved 40 days after filing, absent Commission action to suspend the advice letter.⁵

³ Section 853 states in relevant part: "The Commission may... exempt any public utility or class of public utility from this article if it finds that the application thereof ...is not necessary in the public interest."

⁴ Pursuant to Appendix A of D.94-05-051, the advice letter process may not be used for purposes of market entry and it does not apply to transactions covered under § 854(b) and (c). Furthermore, D.98-07-094 specifies that the advice letter procedure does not apply to CLCs owned by or affiliated with incumbent local exchange carriers (ILECs).

⁵ On February 14, 2001, the Commission released a draft decision in Rulemaking 98-07-038 that would shorten this automatic approval period, absent a protest or suspension by Commission staff, to 30 days (see Appendix A, Proposed General Order 96-B, Rule 7.3.4(1) and Appendix C, Telecommunications Industry Rules, Rule 1.15 and Rule 7.2(5)).

C. 360networks Requested Relief

In this application, 360networks asks the Commission to suspend the existing advice letter procedure and forego any review under § 851 for transfer of assets or transfers of control involving NDIECs and CLCs. Specifically, 360networks asks the Commission to forego review of any transaction involving the sale, lease, mortgage, encumbrance, or disposal by an NDIEC or CLC of its telecommunication facilities to any other public utility. Applicant justifies the request by describing the widespread practice among carriers to enter various agreements to collocate equipment, purchase or lease portions of each others conduits, and make grants of “indefeasible rights to use” (IRU) conduits and associated property. According to 360networks, these “inherently uncontroversial transactions among NDIECs and CLCs...do not need to be regulated by the Commission.”⁶ Applicants assert these asset transfers advance the public interest because the joint use of facilities is more economical and reduces construction and related environmental impacts. Furthermore, Applicant argues that the administrative resources required to process what it envisions will be hundreds, if not thousands, of advice letters for these types of transactions would be an unnecessary burden on Commission staff with no corresponding benefit to the public interest. 360networks claims that the rapid increase in the volume of transactions between and among certificated carriers for shared use of facilities and the proliferation of market participants requires the Commission to modify its procedures to reflect current market realities.

⁶ A.00-11-055, p. 4.

In its application, 360networks questions whether all transfers of assets or interests even require review and approval under § 851. Specifically, 360networks speculates that carriers have already entered into hundreds and perhaps thousands of IRUs, shared use and/or joint use arrangements without the Commission's knowledge or prior approval. 360networks cites a Commission order granting resale authority that noted an applicant held certain IRUs and permitted use of them under resale authority.⁷ 360networks extends the language in that citation to imply that IRUs do not require § 851 scrutiny.

D. Discussion

Section 851 provides that no public utility may “sell, lease, assign, mortgage or otherwise dispose of or encumber” its property that is necessary or useful in performing its duties to the public without first having secured the Commission's authorization. The purpose of Section 851 is to enable the Commission, before any transfer of property is consummated, to review the situation and take such action, as a condition of the transfer, as the public interest may require. We have held that the relevant inquiry is whether the proposed transaction is “adverse to the public interest.”⁸

Both D.94-05-051 and D.98-07-094 streamlined the Commission's regulatory review under § 851 for transfers of property by NDIECs and CLCs respectively. In those orders, the Commission noted that it has endeavored to

⁷ D.99-05-022, mimeo., at p. 5, fn. 3.

⁸ Universal Marine Corporation (1984) 14 CPUC2d 644, 646. See also Southern California Edison Company, D.99-03-016, p. 14.

simplify regulatory oversight over competitive providers when in so doing it would not compromise the public interest.⁹

Although we are sympathetic to 360networks' plea for regulation of competitive providers to keep pace with current market realities, we are not persuaded to change the status quo and exempt NDIECs and CLCs from review under § 851 for transfers of assets or interests. First, we note that it is not appropriate for 360networks to request relief for an entire class of carriers in an application by a single carrier. Rather, an exemption from § 851 for all NDIECs and CLCs is more appropriately the subject of a rulemaking so that all persons or entities who would be affected by the exemption would receive notice and an opportunity to comment. At this time, we are unwilling to dedicate the resources necessary to address this issue in a rulemaking proceeding, and it would not be appropriate, here, to grant exemptions to all carriers based on this single application that was not served on any other parties.

Second, even when we consider the substance of the relief requested, 360networks does not persuade us to suspend the current advice letter process. While on many occasions we have approved joint use arrangements and noted their public interest benefits, we have granted this approval through our § 851 review authority.¹⁰ The mere fact that some transfers of assets may involve joint use of facilities does not justify a blanket exemption from Commission review under § 851. The application hypothesizes that the Commission will be inundated with advice letters and unable to process them if review is indeed

⁹ See D. 94-05-051, 54 CPUC2d 520, 521 and D.98-07-094 (1998 Cal. PUC LEXIS 891 *7).

¹⁰ See, for example, D.00-07-010, D.00-01-014 and D.98-02-110.

required. Applicant provides no evidence that this has in fact already occurred or is likely to occur. Absent some evidence that the current process is inadequate or overly burdensome, we prefer to keep the status quo. We do not agree that properly filed advice letters will be a drain on resources since they will go into effect automatically after 40 days unless the Commission acts to suspend them. If the advice letters are truly non-controversial, the burden on Commission resources should not be that great.

Third, 360networks' request is too broad in scope because it is not limited to joint use arrangements, but requests exemption for all NDIEC and CLC transfers of assets or control. Under the exemption requested, AT&T (a certificated NDIEC) could theoretically transfer significant portions or even all of its assets to Worldcom (also an NDIEC) without any advance review. Such a transfer would likely raise competitive concerns. The existing process reserves an outlet for the Commission to consider competitive concerns and to at least be aware that the transfer might occur. We do not agree with 360networks that the Commission does not need to regulate these transactions and that an exemption is in the public interest. The current process provides an appropriate balance of notifying the Commission and interested parties of the proposed transaction, allowing the Commission to take action if necessary, while at the same time expediting approval for non-controversial transactions. We will not grant a blanket exemption from § 851 because we find that review is necessary for the public interest.

Fourth, we reject 360networks' exemption request because we do not find it appropriate to relinquish the Commission's discretionary review of asset transfers and transfers of control without further detail about the types of transactions involved. We are concerned that some of those transfers could raise

environmental policy concerns and we want to preserve the Commission's ability to address any such concerns, should it choose to, at the time a carrier files an advice letter.¹¹ Thus, for the same reasons articulated above, we prefer to maintain the current review process wherein carriers are required to notify the Commission of proposed transactions so we can determine if any action or review is warranted. Moreover, we note that in our currently pending rulemaking to consider our implementation of the California Environmental Quality Act (CEQA) with respect to telecommunications carriers, we are considering the competitive effects of our current environmental review practices on the various carrier types.¹² We believe the issue of whether to grant certain carriers an exemption from § 851 review could raise competitive equity issues due to differing levels of environmental review and those issues are appropriately addressed in the context of that rulemaking. Again, we deny the exemption request because we find that some level of review is necessary in the public interest.

360networks also questions whether an "IRU" or joint use arrangement with another carrier even meets the threshold for review under § 851. Furthermore, 360networks implies that numerous transactions of this type may not have been filed for Commission approval under the advice letter procedure.

¹¹ For example, carriers who have obtained authority to construct facilities under the Commission's former "batch" environmental review process could construct facilities for other carriers who do not have authority to construct, and then transfer those facilities to those other carriers. Thus, carriers without Commission authority to construct could complete telecommunications facilities and avoid independent environmental review by the Commission.

¹² Rulemaking 00-02-003, p. 3.

We noted the use of IRUs in D.99-05-022 when we considered the environmental impacts of granting resale authority to Williams Communications (Williams). Our statements regarding IRUs in that order were in the context of whether a grant of resale authority to Williams would have environmental effects. We noted the existence of certain IRUs and we allowed the use of the existing arrangements by Williams. But the same order also prohibited construction by Williams and did not make any statements that future IRUs would not require Commission review.

We fail to see any distinction between an IRU or joint use arrangement and any other type of lease or encumbrance listed in § 851. At minimum, an IRU or joint use arrangement is not unlike a lease and it certainly can be considered an “encumbrance” because it involves a claim to real property. Therefore, we find that IRUs and other joint use arrangements require approval under § 851 identical to any other transfer or encumbrance of utility property. We remind carriers that any transactions involving “sale, lease, assignment, mortgage, disposition, encumbrance, merger or consolidation” of utility property are void unless they obtain advance approval under § 851.

Because we are sympathetic to some of the concerns raised by 360networks, we will deny this application without prejudice to allow future consideration of a more narrowly focussed exemption from § 851 should evidence arise that the Commission is inundated with and unable to process advice letters under the current process. Any future application should address whether to limit the exemption to joint use arrangements or IRUs that do not involve construction and have no environmental effects.

E. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on April 19, 2001 by 360networks. In its comments, 360networks concedes that its request for exemption is broad in scope, and it states it is prepared to limit its request for an exemption from § 851 to transactions involving “shared use and/or joint use arrangements.” The comments do not define this terminology any further. The comments also posit that there is no public policy reason for denying such a limited exemption from § 851. We are not persuaded by the comments to alter this order because there is no evidence that the Commission’s advice letter process for NDIEC and CLC asset transfers is inadequate.

Findings of Fact

1. As provided by D.94-05-051 and D.98-07-094, the Commission currently requires certified NDIECs and CLCs who seek a transfer of control or transfer of assets to other certified entities to file an advice letter with the Commission.
2. The current advice letter process for NDIEC and CLC transfers of control or assets allows filings to go into effect automatically after 40 days unless the Commission acts to suspend them.
3. Section 851 provides that no public utility may transfer or encumber its property that is necessary or useful in performing its duties to the public without first having secured the Commission’s authorization.
4. The existing advice letter process allows the Commission to consider competitive concerns and environmental issues related to transfers of control and transfers of assets.

5. An IRU or other joint use arrangement is an encumbrance as defined in § 851.

Conclusions of Law

1. An exemption from § 851 for an entire class of carriers is more appropriately the subject of a rulemaking and requires appropriate notification of all affected interests.

2. The Commission should retain the current advice letter process set forth in D.94-05-051 and D.98-07-094 because it provides notification of proposed transactions and expedited approval of non-controversial transactions.

3. The Commission should deny 360networks' request for exemption from § 851 because some level of review of CLC and NDIEC transfers of assets and control is necessary for the public interest.

O R D E R

IT IS ORDERED that:

1. Application (A.) 00-11-055 by 360networks (USA) Inc. for an exemption from Section 851 for transfers of assets, property, or interests by non-dominant interexchange carriers and competitive local carriers is denied.

2. A.00-11-055 is closed.

This order is effective today.

Dated May 14, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners